APPEAL NO. 92102
APRIL 24, 1992

On February 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent, claimant herein, was injured in the course and scope of her employment on (date of injury), and decided she was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Carrier contests the hearing officer's Findings of Fact Nos. 4, 5, and 6, and Conclusion of Law No. 2, and disputes portions of the hearing officer's Statement of Evidence, in particular the statement that carrier waived its right to contest compensability. Carrier requests that we reverse the hearing officer's decision and render a new decision. Claimant did not file a response to carrier's request for review.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that pain went through her back on (date of injury), when she was dragging a fully-loaded garbage can down a flight of stairs at the high school where she worked. Claimant was about 56 years old at the time of the incident. She had been working for carrier, a self-insured political subdivision of this state under the provisions of Article 8309h, for approximately 11 years as of the date of her alleged injury. She said the incident occurred at 9:00 a.m. and that at 10:00 a.m. she told her immediate supervisor, Mr. MH, that she thought she had injured her back again. She said Mr. MH said to her, "I don't want to hear this. If you can't do your work we don't need you." Claimant said she went back to her work that day and continued to work until about September 9, 1991.

Claimant also said that at the request of her immediate supervisor and the vice principal, she went to her usual doctor, Dr. V, for a physical examination. She said they asked her to have an examination because they told her she wasn't doing her work. She said she did not tell Dr. V she had hurt herself on the job when she first saw him, but did tell him at a later date. Claimant denied having seen Dr. V prior to (date of injury), for back problems. She said she went to him for a recurrent bladder infection. Claimant acknowledged that she had a prior work-related back injury for which back surgery was performed in 1984 or 1985. However, she said her back had not bothered her since her prior surgery up until the current incident on (date of injury), and that she had not missed work because of her back before the current incident. Claimant also said she met with another supervisor, Mr. WH, after the current incident. She said she did not tell him she was hurt on the job because she thought her immediate supervisor would report her injury. Claimant also stated that she has a condition which makes her short-winded and that she had a hernia repaired in the last two or three months. She testified that her back is worse now than it was before (date of injury).

Claimant's immediately supervisor, Mr. MH testified that he did not recall claimant

reporting an injury on (date of injury). He said that claimant told him on an unspecified date that she had hurt her back years before and that gave her problems. He said that claimant worked slow, had breathing problems, needed frequent breaks, and had a problem with completing her work. He talked to his supervisor about claimant's work problem and they agreed that she should see a doctor to find out whether she could do her job. This witness also stated that at some later time when claimant came to pick up her check, she told him she had "very bad trouble with her back" and that a "disc was gone or something." He also testified that in (date of injury) one of claimant's duties was to lift and carry garbage cans downstairs.

Mr. WH, carrier's supervisor of housekeeping, testified that claimant told him on September 9, 1991, she had hurt her back four or five years before while moving typewriters at the high school, and that he never got the idea that she was reporting an on-the-job injury that happened in (date of injury). He said that claimant was asked to get a physical examination because the vice principal and he had reason to believe her health might have been in danger if she continued to work. He said he had no personal knowledge of the alleged injury. He described claimant as very hardworking and dependable, and that to his knowledge she was a truthful and honest employee with a good attendance record. According to this witness, he and others met with claimant on September 16, 1991, and discussed temporary disability benefits under a disability plan that is not related to on-the-job injuries or workers' compensation insurance. He said that claimant did not tell him at that meeting that she suffered an on-the-job injury on (date of injury). He also said that claimant's immediate supervisor never told him that claimant reported a work-related injury.

In a transcribed recorded statement the vice principal, Mr. LL, stated that he told claimant to get a physical examination the first week of September because of her complaints of weakness in her legs, shortness of breath, a bloated stomach condition, and a hernia she said she had for a long time. He said the work restrictions claimant brought back after the examination included no lifting and no climbing of stairs. He also stated that claimant called in sick with a kidney problem on September 9th; that on September 16th she came to work with another doctor's report containing work restrictions and complained of pain due to kidney problems at that time; and that it was not until September 21st that claimant told him she had injured her back carrying garbage cans down the stairs. Although he did not remember the date of the incident, he did recall seeing claimant carrying a garbage can down steps without any indication of a back injury. However, he also stated that claimant would carry garbage cans several times every day.

A medical evaluation report from Dr. V dated September 7, 1991, reflected that Dr. V advised carrier that claimant was not able to perform certain work duties, including climbing stairs, placing cafeteria chairs on tables, and lifting and carrying objects weighing more than 20 pounds. A medical progress report from Dr. V dated September 16, 1991, contained the same restrictions as the September 7th report and also noted the restrictions as "permanent." The doctor described the nature of claimant's "injury/illness" as "degenerative disc disease--lumbar spine."

In a report dated December 3, 1991, Dr. V stated that claimant had been a patient of his since 1988 and that since early 1989 she had had chronic low back pain and was treated by his clinic on numerous occasions for severe degenerative disc disease of the lumbar spine. He further stated that claimant was seen on September 12, 1991, for a "flare-up" of her lower back problems and that that incident was similar to her previous episodes of back pain. Dr. V noted that claimant told him on September 19, 1991, that she had "re-injured her back," but did not tell him or his staff that it was a work-related injury. Dr. V stated that it was clear to him that it was simply a recurrence of claimant's low back problem. He further noted in his report that claimant had a lumbar laminectomy in 1985; that her x-rays done in 1990 showed extensive degenerative disc disease of the lumbar spine; that claimant could only do light duty because of her chronic back trouble; and that her work restrictions are permanent.

The findings and conclusion complained of on appeal are:

FINDINGS OF FACT

4.On (date of injury), the claimant hurt her back while she was moving a barrel of trash down some stairs at [employer].

5.The claimant reported her injury to her employer on the same day.

6.The claimant obtained a medical diagnosis which indicated that the claimant had suffered an injury to her back.

CONCLUSIONS OF LAW

2.The claimant was injured in the course and scope of her employment on (date of injury).

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). An "injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). It is well settled that the mere existence of a pre-existing injury or disease which aggravates or enhances a complained of injury does not defeat a claimant's right to recover workers' compensation benefits. Gonzales v. Texas Employers Insurance Association, 772 S.W.2d 145, 148 (Tex. App.-Corpus Christi 1989, writ dism'd). In order to defeat the claim, the insurance carrier must show that the prior injury or illness is the sole cause of the claimant's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977). An injury that aggravates a pre-existing bodily infirmity is compensable provided overexertion or an accident arising out of employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534, 537

(Tex. App.-Houston [1st Dist.] 1988, no writ).

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulmon, 722 S.W.2d 694, 697 (Tex. 1987). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. However, the claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). In workmen's compensation cases the issue of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinion of medical experts. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494-495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). An exception to that rule is that when a subject is of such scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in the subject has any probative value. Pegues, *supra*. Expert testimony is generally not required to prove an issue of probability, if the trier of fact has been given sufficient evidence showing the prompt onset of symptoms following a specific event. *See* Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ) wherein the court concluded that the claimant's testimony constituted some evidence from which the jury could reasonably have inferred that a myelogram probably aggravated his pre-existing lower back condition.

The evidence was conflicting on whether or not claimant reported her injury to her immediate supervisor on the day of her alleged accident. Claimant swore that she did tell her immediate supervisor, and her immediate supervisor swore that he could not recall claimant reporting an injury to him on (date of injury). The hearing officer heard their controverted testimony and resolved the matter in favor of claimant's testimony as he was entitled to do under the authorities previously cited herein. *See also* Associated Employers Insurance v. Burris, 321 S.W.2d 112, 117 (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.). Moreover, since timely notice of injury was not a disputed issue at the hearing, Finding of Fact No. 5 concerning reporting of the injury, insofar as it addresses timely notice, may be disregarded as an unwarranted finding. *See* Bittick v. Ward, 448 S.W.2d 174, 178 (Tex. Civ. App.-Beaumont 1969, writ ref'd n.r.e.). Carrier's complaint concerning Finding of Fact No. 5 is overruled.

The hearing officer's finding that claimant obtained a medical diagnosis which indicated that she had suffered an injury to her back finds some support in Dr. V's report of

a "flare-up of her lower back problems" and in his recommendation of permanent work restrictions after his examination of claimant. There was no evidence that claimant had previously had restrictions placed on her work activities due to her back condition. Claimant's counsel urged at the hearing that claimant's claimed back injury may be an aggravation of her pre-existing back condition. An aggravation of a pre-existing back condition by lifting can be compensable even though the pre-existing condition contributed to the incapacity. *See* Oswald v. Texas Employers' Insurance Association, 789 S.W.2d 636, 640 (Tex. App.-Texarkana 1990, no writ); Texas Employers' Insurance Association v. Thornton, 556 S.W.2d 393 (Tex. Civ. App.-Fort Worth 1977, no writ); INA of Texas v. Howeth, 534 S.W.2d 755 (Tex. App.-Houston [1st Dist] 1988, no writ). It is true that Dr. V stated that it was clear to him that it was simply a recurrence of her low back problem. But we do not think that Dr. V's statement totally negates the lifting and dragging incident as an aggravation of claimant's pre-existing condition given his impression of a "flare-up" and the obvious severity of the "flare-up" as shown by the very limiting restrictions placed on claimant's work activities.

The finding that claimant hurt her back while she was moving a barrel of trash down some stairs at the high school on (date of injury), is supported by claimant's testimony and by the "flare-up" reported by her doctor. *See* Baugh and Pegues, *supra*. Clearly, a contrary finding could have been made on the basis of Dr. V's report of December 3, 1991, which attributes claimant's back problem to her pre-existing condition. *See* Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.) wherein the court held that the jury finding that the claimant did not suffer incapacity as a result of his injury was not against the great weight and preponderance of the evidence in light of a history of medical problems before his current injury and a continuation of those problems after his injury. However, claimant's counsel urged at the hearing that claimant suffered an aggravation to her pre-existing condition and, under authorities previously cited, an aggravation of a pre-existing back condition by a work-related accident can be compensable. It has been held that the judgment of the trial court should be affirmed if it can be sustained on any reasonable theory supported by the evidence authorized by law. Daylin Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied). It has also been held that a reviewing court is not authorized to set aside a verdict because the trier of fact may have drawn inferences and conclusions different from those the court deems most reasonable, even though the record contains evidence of, or gives equal support to, inconsistent inferences. Garza, *supra*.

Having reviewed the entire record, we can not conclude that the evidence supporting the hearing officer's finding of a work-related injury was so uncertain, inconsistent, improbable, or unbelievable that, although constituting some evidence of probative force in support of the finding, it would nevertheless be clearly unjust to permit his decision to stand. *See* Gilbert v. Canter, 500 S.W.2d 557, 559 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.). In our opinion, there was some evidence of probative value to support the hearing officer's finding of a work-related injury, and his finding was not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's

Estate, 150 Tex. 662, 244 S.W.2d 660, 661 (1951).

Carrier also complains of the hearing officer's statement in the "Statement of Evidence" portion of his decision that under Article 8308-5.21(a) carrier "waived its right to contest compensability" for failure to file a form TWCC-21 within 60 days. Carrier asserts that its first TWCC-21 was filed within the 60-day requirement of Article 8308-5.21(a) and that "whether or not the carrier raised its right to contest compensability was not an issue for the hearing officer to consider nor was it brought up during the hearing." Carrier is correct in asserting that its right to contest compensability was not an issue for the hearing officer to consider. At no stage of the proceeding was waiver of carrier's right to contest compensability brought up by the parties or made a disputed issue. The issue of whether or not claimant sustained an injury in the course and scope of her employment was considered as the disputed issue at all stages of the dispute resolution process, was never objected to as having been waived by carrier, and was litigated at the hearing by both parties. Under these circumstances, predicating a determination of the disputed issue on the application of waiver under Article 8308-5.21(a) would not be appropriate. *See* Texas Workers' Compensation Commission Appeal No. 91016, decided September 3, 1991; Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992. However, we discern from the hearing officer's discussion of the evidence, especially his consideration of Dr. V's report of December 3, 1991, which was introduced into evidence by carrier, his recognition that the evidence was conflicting, his specific findings of fact on the issue of whether claimant sustained a compensable injury, and the absence of any finding of fact or conclusion of law pertaining to waiver under Article 8308-5.21(a), that the hearing officer did not predicate his decision on the disputed issue on the basis of waiver under Article 8308-5.21(a), but instead, weighed and considered all the evidence adduced at hearing. Accordingly, we are of the opinion that the hearing officer did not commit reversible error in stating in the "Statement of Evidence" that carrier had waived its right to contest compensability. Our opinion is not to be taken as condoning such statements under the circumstances present in this case, and in another setting might well cause reversal.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge